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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1210

SOUTH HILL NEIGHBORHOOD ASSOCIATION, INC., et al.,
Petitioners,

vs.

GEORGE ROMNEY, Secretary of Housing and Urban Development, et al.,
Respondents.

SUPPLEMENTARY PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPPLEMENTARY STATEMENT

The Petition for Certiorari was filed on February 19, 1970. The brief of the local Respondents in opposition was filed and service was received on March 3, 1970. On that date, this Court decided **Association of Data Processing Service Organizations, Inc. v. Camp** (Oct. Term, No. 85), 38 United States Law Week 4193, and **Barlow v. Collins** (Oct. Term, No. 249), 38 United States Law Week 4195. On March 10, 1970 the Petitioners filed an application with this Court for injunction pending review by certiorari. The Respondents filed a response in opposition and this Court denied the application for injunction on March 13, 1970. On March 23, 1970, the Petitioners received

service of the brief of respondent HUD in opposition to the petition for certiorari. The instant supplementary brief addresses itself to the application of the **Data Processing** and **Barlow v. Collins** cases to the pending petition for certiorari.

REASONS FOR GRANTING THE WRIT

I

The Ruling Below Conflicts With Recent Decisions by This Court on the Standing Issue.

Petitioners clearly have standing to sue under the rulings by this Court in **Data Processing v. Camp** and **Barlow v. Collins**. These two new decisions throw into bold relief the error of the lower courts which employed the wrong tests to determine standing in this case. Respondent HUD seemingly now concedes the standing issue and contends that Petitioners have insufficient "legal interest" to prevail on the merits.[1] Similarly, the local Respondents have tacitly conceded the standing point and contend that the quantum of Petitioners' "interests" is insufficient to satisfy the tests enunciated in **Data Processing** and **Barlow**.[2] These concessions underscore the need for review of the lower court ruling which is in conflict with these new decisions and which is so clearly erroneous it should not be allowed to stand.

Petitioners alleged "injury in fact" to their economic and aesthetic conservational interests caused by the refusal of Respondent HUD to perform the administrative

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[1] Brief for the Respondent Secretary of Housing and Urban Development, page 8. This contention is discussed in part II of this supplementary petition.

[2] Response of Certain Respondents to Application of Petitioners for Injunction Pending Review by Certiorari, page 3.

actions commanded by the relevant federal statute.[3] Further, Petitioners are "arguably within the zone of interests" protected by the National Historic Preservation Act of 1966. Companion legislation, the overall legislative scheme and ample legislative history establish the zone of interests protected by Section 106 to be historic preservation and protection of National Register properties from destruction by federally assisted activities. Petitioners are historic preservationists representing the interests of that class and the public at large in pursuit of the federally-recognized aesthetic conservational values of historic preservation and they also act as statutory beneficiaries of the federal statutory protection scheme designed to preserve those values.

Both their economic and aesthetic conservational interests will be injured in fact by the Administrative action being challenged.

Respondent HUD does not now contest that the agency action here challenged is reviewable by the courts. The local Respondents, however, seem to contend that the protested agency action is not judicially reviewable because committed to agency discretion by law.[4] They contend that Respondent HUD is invested with absolute discretion to decide whether National Register properties may be demolished with federal funds. That administrative decision may or may not be judicially reviewable. A different lawsuit would have to test that particular assertion since HUD never made such a decision in this case. Indeed, the case arises because HUD refused to make that decision. The issue in this case is whether HUD has absolute discretion to disregard the explicit commands of Section

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[3] The essential factual allegations in the Complaint, which were uncontroverted, are summarized in footnote 4, page 16 of the Petition for Writ of Certiorari and need not be repeated here.

[4] Brief of Certain Respondents, page 24.

106 specifying the administrative procedures it must follow prior to approving demolition of National Register properties with federal funds, namely, referral for comment to the Advisory Council and taking their comment into account. Petitioners are challenging administrative default by HUD—not an administrative decision HUD made.[5] Judicial reviewability of HUD's administrative procedural actions in this context is to be determined by reference to the intent of Congress on this point when it enacted Section 106. Both **Data Processing** and **Barlow** establish that the presumption is that agency action is judicially reviewable and will prevail unless there is clear and convincing statutory indicia that Congress intended otherwise. Respondents cite no such evidence.

II

Important Questions of the Federal Law of Historic Preservation Were Determined by the Lower Court Without Full Consideration of the Merits

The **Data Processing** and **Barlow** decisions make abundantly clear that questions of standing are to be carefully separated from inquiry into the merits in order that parties challenging administrative actions receive "full consideration of their claims on the merits." Nothing is clearer in this case than the fact that Petitioners have never received "the focused and careful decision on the merits to which they are clearly entitled." Neither of the lower courts in this case fully inquired into the merits.[6] The contentions asserted by both Respondents

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[5] See **Scanwell Laboratories, Inc. v. Thomas** (CA DC 2/13/70), 38 U. S. Law Week 2454.

[6] The briefs submitted to the Federal District Court were directed by order of the Court to the questions of "Jurisdiction" and "Standing" and neither the truncated evidentary hearing nor any oral argument in that Court involved full inquiry into the merits. The Sixth Circuit Court of Appeals had no record before it, held no hearing or oral argument and did not independently address the merits in their ruling.

before this court demonstrate the need for review in order that judicial interpretation of Section 106 be given the focused attention it warrants and has not yet received.

Respondent HUD asserts the "legal interest" requirement in contending that Petitioners cannot prevail on the merits because they "have no legal interest in compelling HUD to carry out the requirements of Section 106."[7] The requirement of a "legal interest" goes to the "merits," namely whether the administrative action challenged produced injury in fact to an interest protected by the relevant statute. The same statutory materials evidencing that Petitioners are members of a protected statutory class entitled to judicial review, similarly evidence sufficient "legal interest" conferred by Section 106 for purposes of the merits.[8] If anything more in the way of "legal interest" is required, then Petitioner South Hill Neighborhood Association, Inc., has such a "legal interest" by virtue of the economic and non-economic interests it has in protecting the historic character of the South Hill neighborhood. Petitioners Dennis and Kafoglis clearly hold such additional interest by reason of their ownership of National Register buildings—the unique status of which rests on the National Historic Preservation Act of 1966. Nothing in the **Data Processing** or **Barlow** decisions suggests that their right to contest in condemnation proceedings in state courts the administrative and legal actions of a local agency, forecloses federal

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[7] The Federal District Court in ruling that Petitioners did not have standing held that they had no "real interest" in the litigation, Petition for a Writ of Certiorari, A-56, and had no "special interest" in the controversy, Ibid. A-58, but did not advert expressly to "legal interest" at all and did not mention any "interest" in ruling on the merits.

[8] Brennan J., concurring and dissenting in **Association of Data Processing Service Organizations, Inc., et al. v. Camp., et al., Clemon Barlow et al. v. B. L. Collins, et al.** (Oct. Term 1969 Nos. 85 and 249), 38 U. S. L. W. 4198.

judicial review of totally different administrative actions by a federal agency. The inefficacy of indirect protest in the state courts as a procedural alternative to direct federal judicial review of agency action is demonstrated by the events in the companion case.[9]

Focused judicial review of the merits is required to determine whether HUD violated Section 106. The "plain meaning" of Section 106 urged by Respondent is not self-evident. Respondent HUD urges that its approval of urban renewal plans includes approval of the expenditure of federal funds.[10] The word "expenditure" in common parlance means simply payment. Congress normally uses "expenditure" to mean the act of payment of money, and uses "obligation" or "commitment" to signify the incurring of a liability by a federal agency.[11] HUD actually expends money on a given urban renewal project by periodic payments to the local public agency. No judicial inquiry into this aspect of the merits has yet occurred in this case.

Nor is it self-evident that an undue administrative burden would be caused by requiring HUD to apply Section 106 to the implementation phase of urban renewal projects. Judicial determination of "undue burden" normally follows careful elucidation of facts of the administrative process and a study of the legislation and legislative history and the weighing of competing policies. No such judicial inquiry has been given the merits in this case. In fact, HUD elaborately controls every significant activity in the implementation of its federally-funded pro-

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[9] Petition for a Writ of Certiorari, A-10, A-81.

[10] For the Respondent Secretary of Housing and Urban Development, Page 9.

[11] Nash and Cibinic, **Federal Procurement Law** (George Washington Univ., 2d ed. 1969), page 339.

grams, even after contracting.[12] Contentions by HUD that forcing the agency to read the National Register and comply with Section 106 would cause "delay and serious administrative problems" would seem to require proof rather than simple assertion. In the final analysis the intention of Congress would control, notwithstanding an administrative burden, and no full judicial study of the relevant legislative materials has yet been made.

In summary, certiorari review by this Court should be granted in order that the merits receive careful study before the new federal law of historic preservation is congealed by judicial inattention.

CONCLUSION

For these reasons a writ of certiorari should issue.

Respectfully submitted

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Certificate of Service

I hereby certify that on this 30th day of March, 1970, copies of this Supplementary Petition for Certiorari were airmailed, postage prepaid, to each of the following Counsel for Respondents at their designated business addresses: Montjoy Trimble, Esq., Central Bank Building, Lexington, Kentucky 40507, Counsel for Urban Renewal and Community Development Agency of the City of Lex-

[12] See **Thorpe v. Housing Authority of Durham**, 393 U. S. 268 (1969). The citation in the Petition for Certiorari on p. 13, referring to similar HUD approvals in Urban Renewal projects should be corrected to read: Urban Renewal Handbook RHA 7214.1, ch. 4, § 4, page 1, 2/68 and Urban Renewal Handbook RHA 7209.1, ch. 4, § 3, page 2, 2/68.

ington, Robert E. Featherstone, Chairman, William R. Embry, Vice-Chairman, Byron Romanowitz, Member, D. C. Noble, Member, H. J. Hagler, Member, Jennie Bryant, Director; A. Gene Oliver, Esq., Citizens Union Bank Building, Lexington, Kentucky 40507, Counsel for Citizens Union National Bank and Trust Company, Inc.; A. B. Rouse, Esq., 141 North Upper Street, Lexington, Kentucky 40507, Counsel for J. Norwood Hodge and Norwood Construction Company, Inc.; Richard Smith, Esq., Municipal Building, Lexington, Kentucky 40507, Counsel for The City of Lexington, Kentucky, The Board of City Commissioners of the City of Lexington, Charles Wylie, Mayor, Joseph Graves, Member of the Board, Harry Sykes, Member of the Board, Fred Fugazzi, Member of the Board, Thomas Underwood, Member of the Board; and Eugene Siler, Esq., United States Attorney, Federal Building, Lexington, Kentucky 40507, Counsel for George Romney, Secretary of Housing and Urban Development; William D. Ruckelshaus, Esq., Assistant Attorney General, Civil Division, Room 3706, United States Department of Justice, Washington, D. C. 20530, Alan S. Rosenthal, Esq., and Alexander P. Humphrey, Jr., Esq., United States Department of Justice, Washington, D. C. 20530, Counsel for Respondent George Romney, Secretary of Housing and Urban Development, and to the Solicitor General, Department of Justice, Washington, D. C. 20530; and William Stanley, Jr., Covington & Burling, 888 16th Street, N. W., Washington, D. C. 20006, Counsel for the National Trust for Historic Preservation.

I further certify that all parties required to be served have been served.

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